

IN ARBITRATION PROCEEDINGS PURSUANT TO  
A MEMORANDUM OF UNDERSTANDING BETWEEN THE PARTIES

In the matter of a controversy between: )  
)  
**CALIFORNIA STATE EMPLOYEES** )  
**ASSOCIATION,** )  
Union, )  
and ) **OPINION AND AWARD**  
) *CSMCS No. ARB-00-0097*  
**STATE OF CALIFORNIA,** ) *DPA Case No. 99-03-0004*  
**DEPARTMENT OF CORRECTIONS** ) *CSEA Case No. 00-020-ARB*  
**(California Men's Colony),** )  
Employer, )  
)  
Involving the grievances of Gay Cantwell, )  
Emily Thomas and David Troyer. )

This matter was heard by Arbitrator Catherine Harris, Esq. who was mutually selected by the parties to render a final and binding decision pursuant to the parties' Memorandum of Understanding.<sup>1</sup>

Marcia Mooney, Senior Labor Relations Representative, appeared on behalf of the **CALIFORNIA STATE EMPLOYEES ASSOCIATION** (herein "CSEA"). Also present throughout the hearing was CSEA Senior Steward Keith Wimer.<sup>2</sup>

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS** (herein "the State") was represented by Amy Dobberteen, Esq., Labor Relations Counsel, Department of Personnel Administration. Jackie Cervantes, Labor Relations Specialist, Department of

<sup>1</sup> The arbitrator was selected from a list supplied by the California State Mediation and Conciliation Service.

<sup>2</sup> The Grievants were present and testified on the first day of hearing.

1 Corrections and Herb Connor, Employee Relations Officer, California Men's Colony, also  
2 attended the hearing on behalf of the State.  
3

4 Hearings were conducted on March 19, May 17 and July 16, 2001.<sup>3</sup> At the hearing,  
5 each party was given the opportunity to present testimonial<sup>4</sup> and documentary evidence,<sup>5</sup> to  
6 cross-examine the other party's witnesses and to make argument.<sup>6</sup> On September 6, 2001,  
7 the record was closed and the matter was taken under submission.<sup>7</sup>  
8

### 9 RELEVANT PROVISIONS OF THE AGREEMENT

10 The parties agree that the relevant agreement for purposes of the instant dispute is the  
11 Unit 3 Contract between CSEA and the State for the period November 1, 1992 through June  
12 30, 1995 (herein "the Agreement") which contains the following provisions:  
13

14 ///

15 <sup>3</sup> The first day of hearing was held at the California Men's Colony while the second and third  
16 days of hearing were held in Sacramento at the offices of the Department of Personnel Administration. By  
17 agreement of the parties, no stenographic or tape recorded record was made of the proceedings by either  
18 the arbitrator or the parties.

19 <sup>4</sup> During three days of hearing, the arbitrator heard the testimony of the following witnesses: Gay  
20 Cantwell, Emily Thomas, Louisa Bonilla, Beverly Young, Mary Cornelius, Deborah Roberts, David  
21 Troyer, Don Marriott, Keith Wimer, Cynthia Semel, Dennis Fuji, Ray Sadowski, Frances Law, and Herb  
22 Conner.

23 <sup>5</sup> During the course of the hearing, the following documents were received into evidence by the  
24 arbitrator: Joint Exhibits "1" through "5", CSEA Exhibits "1" through "22" and State Exhibits "A" and  
25 "B".

26 <sup>6</sup> At the close of the hearing, the parties agreed to the following schedule for the submission of  
27 post-hearing briefs: CSEA to file and serve its opening brief (by U.S. mail) on July 31, the State to file  
28 and serve its opposition brief on August 20, and CSEA to file its reply brief on September 5. Consistent  
with the stipulation of the parties all of the briefs had been received in the arbitrator's office on September  
6, 2001.

<sup>7</sup> It was further agreed that the arbitrator would have 30 days from the closing of the record in  
which to issue her Opinion and Award by duplicate originals, regular mail, to both parties.

## 8.2 Sick Leave

a. As used in this Section, "sick leave" means the necessary absence from duty of an employee because of:

(1) Illness or injury, including illness or injury relating to pregnancy;

(2) Exposure to a contagious disease which is determined by a physician to require absence from work;

(3) Dental, eye, and other physical or medical examination or treatment by a licensed practitioner;

(4) Absence from duty for attendance upon the employee's ill or injured mother, father, husband, wife, son, daughter, brother or sister, or any person residing in the immediate household. Such absence shall be limited to five (5) workdays per occurrence or, in extraordinary situations, to the time necessary for care until physician or other care can be arranged.

b. ...

c. ...

d. The department head or designee shall approve sick leave only after having ascertained that the absence is for an authorized reason and may require the employee to submit substantiating evidence including, but not limited to, a physician's or licensed practitioner's verification. Such substantiation shall include, but not be limited to, the general nature of the employee's illness or injury, the anticipated length of the absence, any restrictions upon return to work and anticipated future absences. If the department head or designee does not consider the evidence adequate, the request for sick leave shall be disapproved. Upon request, a denial of sick leave shall be in writing stating the reasons for the denial.

e. An employee shall not be required to provide a physician's verification of sick leave when he/she uses up two (2) consecutive days of sick leave except when:

(1) the employee has a demonstrable pattern of sick leave abuse; or

(2) the supervisor believes the absence was for an unauthorized reason; or

(3) the employee has an above average use of sick leave.

## 5.5 Reprisals

The State and CSEA Local 1000 shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this Contract. The principles of agency shall be liberally construed.

## 4.1 State Rights

a. Except for those rights which are expressly abridged or limited by this Contract, all rights are reserved to the State.

b. Consistent with this Contract, the rights of the State shall include, but not be

1 limited to, the right to determine the mission of its constituent departments,  
2 commissions and boards; to maintain efficiency of State operation; to set standards of  
3 service; ... to determine the methods, means, and personnel by which State operations  
4 are to be conducted; ... The State has the right to make reasonable rules and  
5 regulations pertaining to employees consistent with this Contract.

## 6 ISSUES PRESENTED

7 At the hearing, the parties stipulated that there are no jurisdictional or procedural  
8 barriers that prevent the Arbitrator from reaching the merits of the consolidated grievances.  
9 The parties further agreed that the arbitrator would have the power to frame the issues raised  
10 by the grievances. Accordingly the arbitrator will decide the following issues: Issue Number  
11 One, whether the State violated Sections 8.2 and/or 5.5 of the Agreement when it issued the  
12 Notices of Placement on Sick Leave Abuse Policy to the Grievants and required the Grievants  
13 to produce automatic verification of all future absences; and Issue Number Two, if so, what  
14 shall be the appropriate remedy? The parties further agreed that in the event that a remedy  
15 were to be ordered, the Arbitrator would retain jurisdiction over any dispute which might arise  
16 in connection with the remedy.  
17

## 18 STATEMENT OF THE CASE

### 19 Background of the Dispute

20 Prior to 1997, there was no practice of administering a Notice of Placement on Sick  
21 Leave Abuse Policy to members of the Unit 3 bargaining unit at California Men's Colony in  
22 San Luis Obispo (herein "CMC"). Rather, the practice of CMC management had been to  
23 encourage employees to maintain a sick leave balance of 80 hours. While sick leave usage in  
24 excess of 80 hours was noted on annual performance evaluations, it did not result in  
25  
26  
27  
28

1 unsatisfactory ratings, or any other employer action.<sup>8</sup>

2 In January of 1997, CMC management was concerned about what it perceived as  
3 excessive use of sick leave.<sup>9</sup> Ray Sadowski, Supervisor of Correctional Education Programs  
4 (herein "Sadowski"), informed Warden Bill Duncan that he would pilot a program to reduce  
5 the use of sick leave at CMC.<sup>10</sup> Accordingly, on January 22, 1997, Sadowski issued  
6 "Extraordinary Sick Time Usage Guidelines" in writing to all Education Staff which required  
7 employees meeting the following criteria to provide medical verification of illness:  
8

- 9 1. An employee unable to personally make the sick leave request to the designated  
10 supervisor.
- 11 2. An employee who has three or more separate occasions of sick leave in any  
12 consecutive twelve-month period of time in conjunction with his/her regular day off or  
13 vacation.
- 14 3. A sick leave request for a date for which the employee previously requested another  
15 form of leave and was denied.
- 16 4. Employees who are sick three or more consecutive days.
- 17 5. If an employee has nine or more days of sick leave within the last consecutive  
18 twelve-month period. This does not apply to individuals who have had extended sick  
19 leaves, or those individuals who were absent from work because of pregnancy-related  
20 illness, or to employees who pre-schedule an approved medical/dental appointment or  
21 treatment.
- 22 6. Employees who have been advised in advance by the notice entitled "Extraordinary  
23 Use of Sick Leave" that medical verification is required.

20 <sup>8</sup> For example, Gay Cantwell's Performance Appraisal Summary dated June 18, 1997 states in  
21 pertinent part: "As of February 1, 1997, you had accumulated 132 hours of sick leave. The CMC  
22 Education Department encourages all staff to maintain a minimum of 80 hours of sick leave in case an  
23 unexpected illness occurs. Congratulations on building up your sick leave above 80 hours' suggested  
24 minimum."

23 <sup>9</sup> Although no statistics were provided, Sadowski recalled that on some occasions, more than one-  
24 fourth (¼) of the approximately 40 to 45 academic and vocational teachers would be absent and he had no  
25 ability to backfill with substitute teachers.

25 <sup>10</sup> Herb Connor, CMC's Employee Relations Officer, testified that, during this same time frame,  
26 the Director of the Department of Corrections had received a mandate from the legislature to improve its  
27 management of sick leave or face budgetary consequences.

1 The memorandum further provides: "When a supervisor becomes aware of a pattern of sick  
2 leave usage by an employee, the supervisor may place the employee on Extraordinary Use of  
3 Sick Leave."<sup>11</sup> On the same date, i.e., January 22, 1997, Sadowski informed all education staff  
4 that the Education Department would be following "... the institution's Extraordinary Sick  
5 Leave Usage Policy."<sup>12</sup>

#### 7 CSEA Reaction to Issuance of the Extraordinary Sick Time Usage Guidelines

8 Keith Wimer, Senior Steward, testified that when he first saw Sadowski's  
9 memorandum dated January 22, 1997, he immediately noted similarities between the  
10 "Extraordinary Sick Leave Usage Policy" and the sick leave provisions of the Unit 6 contract.<sup>13</sup>  
11 Wimer testified that he was concerned because CSEA had not negotiated the new policy and  
12 because, in his view, the policy enunciated by Sadowski effectively changed conditions of sick  
13 leave usage within the Unit 3 bargaining unit. According to Wimer, it was the prevailing view  
14 among Unit 3 bargaining unit members that the state was imposing language on them which  
15 had been negotiated by CCPOA on behalf of employees in another bargaining unit. After a  
16 meeting between Wimer and Warden Duncan, Warden Duncan instructed Employee Relations  
17 Officer Herb Conner to rescind the "Extraordinary Sick Leave Usage Policy."  
18  
19

#### 20 The Rescission of the Guidelines

21 On March 19, 1997, Employee Relations Officer Conner notified all Education Staff  
22

---

23 <sup>11</sup> Employees placed on the sick leave policy were expected to bring doctor's excuses for every  
24 absence until taken off the policy.

25 <sup>12</sup> The memorandum makes only a passing reference to the Agreement stating, "Additionally,  
26 Unit 3 Contract Section 8.2 addresses the issue of sick leave use and abuse."

27 <sup>13</sup> The members of bargaining unit 6 are represented by the California Correctional Peace Officers  
28 Association (CCPOA).

1 that the "CMC Extraordinary Sick Leave Usage Policy and Extraordinary Sick Time Usage  
2 Guidelines" dated January 22, 1997 were being immediately rescinded. The memorandum  
3 further provides:

4       The respective collective Bargaining Unit Contracts for rank and file employees and  
5       government code sections for supervisory employees contain sufficient language and  
6       provisions regarding sick leave use which will be followed.

7 Conner further notified Education Staff that he was removing all documents titled  
8 "Extraordinary Use of Sick Leave" which had been placed in Unit 3 employees' personnel files  
9 during the period from January 22, 1997 to March 19, 1997.<sup>14</sup>

10       On July 1, 1997, Unit 3 teacher and CSEA job steward Keith Wimer was placed on  
11 the Sick Leave Abuse Policy by Supervisor of Academic Instruction Cynthia Semel for a  
12 twelve-consecutive-month period. After CSEA met with Associate Warden C. Wilson,  
13 Wimer received an addendum which contained a profile of sick leave usage and advised Wimer  
14 that he would be ineligible for direct deposit.<sup>15</sup> Since receiving the addendum on February 4,  
15 1998, Wimer has repeatedly requested that he be supplied with the policy and has been told  
16 that management is merely following the Unit 3 contract.<sup>16</sup> In March of 1998, Wimer was  
17  
18

---

19       <sup>14</sup> CSEA job steward Keith Wimer gave un rebutted testimony that when Conner's memorandum  
20 was delivered to him by Supervisor of Academic Instruction Cynthia Semel, Semel informed him that  
21 Supervisor of Correctional Instruction Ray Sadowski was "angry" and that "there was going to be an  
interesting war."

22       <sup>15</sup> As explained by Wimer, the January 1997 notices did not revoke direct deposit privileges.  
23 Moreover, the July 1997 notices, unlike the January 1997 notices, did not exclude pre-scheduled and  
24 approved medical/dental appointments from the computation of absences. Wimer also noted that whereas  
the January notices had placed employees on the policy for six months, the July notices extended the  
duration of the policy to twelve months.

25       <sup>16</sup> Cynthia Semel testified that "... we were told that we were not supposed to be interpreting the  
26 contract." However, Semel admitted that after the policy was rescinded, the criteria for being placed on the  
Sick Leave Abuse Policy remained the same up until the most recent Unit 3 contract.

1 further informed by Associate Warden Wilson that individuals placed on the Sick Leave Abuse  
2 Policy would not be entitled to take advantage of the 10-12 and 11-12 sick leave programs.

### 3 **The Grievances before the Arbitrator**

4  
5 This case arises out of grievances filed by three members of the Unit 3 bargaining unit  
6 all of whom work as educators at CMC. All three Grievants were notified that after an in-  
7 depth review of their attendance during a twelve-month period, it had been determined that  
8 their usage of sick leave was excessive or extraordinary. All three Grievants were also  
9 notified that they would be required to provide medical verification for any and all use of sick  
10 leave for themselves or for sick family care during the next twelve-month period. All three  
11 Grievants were further notified that their sick leave usage would be reviewed during the next  
12 evaluation period and that a decision would then be made to rescind or renew their placement  
13 on the Sick Leave Abuse Policy. While placed on the Sick Leave Abuse Policy, the State  
14 terminated the Grievants' eligibility for direct deposit for payroll purposes. However, none of  
15 the Grievants herein have been the subject of an adverse action or letter of reprimand as a  
16 result of their sick leave usage.

### 17 **The Cantwell Grievance**

18  
19 On June 5, 1998, Gay Cantwell, an Adult Basic Education teacher (herein "Cantwell"),  
20 received a Notice of Placement on Sick Leave Policy based on her usage of sick leave during  
21 the period from January 1997 to January 1998<sup>17</sup> which was described as follows:  
22

23 During the 12-month review, you have been absent on sick leave from your job  
24 assignment a total of 13 full days and 10 partial days. I have noted that there are two

---

25  
26 <sup>17</sup> During this period of time, Cantwell was transferred to a classroom position where she  
27 believes that she was exposed to more viruses.



occasions that sick leave absence was in conjunction with your regularly scheduled day off (RDOs) and holidays. Utilization of sick leave in conjunction with RDOs, vacation, and holidays is considered a classic indicator of sick leave abuse. During this 12-month review, you earned 96 hours of sick leave credit and you used 127 hours. Your sick leave balance at the time of the review was 108 hours. This review supports that extraordinary usage of sick leave exists.<sup>18</sup>

Cantwell signed the notice but indicated that she did not agree with it based on her belief that she had not abused sick leave, i.e., she had been suffering from recurrent upper respiratory viral infections. Cantwell insists, and there is no evidence to the contrary, that her absences during the period January 1998 to January 1999 were all verified by a medical doctor and that she always brought in doctors' notes to avoid being charged with unauthorized use of sick leave or docked pay.<sup>19</sup> None of the physician's verifications supplied by Cantwell were ever questioned by CMC management.

On February 8, 1999, Cantwell received a Notice of Placement on Sick Leave Policy based on her usage of sick leave during the period from January 1998 to January 1999 which was described as follows:

During this 12-month review you have been absent on sick leave, from your job assignment, a total of 6 eight hour days and 6 partial days. I have noted that there are 3 occasions that sick leave absences were in conjunction with your regularly scheduled days off (RDO's). Utilization of sick leave in conjunction with RDO's, vacation and holidays is considered a classic indicator of sick leave abuse. During this 12-month review you earned 96 hours of sick leave credits; you used 55 hours, a usage

---

<sup>18</sup> The above-quoted paragraph also appears verbatim in the text of Cantwell's Performance Appraisal Summary dated June 5, 1998. In her response to this evaluation, Cantwell noted that based on the prior year's evaluation, she had understood the sick leave policy to require that: 1) she maintain a minimum of 80 sick leave hours and 2) that any sick leave in conjunction with RDOs, holidays, vacations and more than two days must be verified in writing by a doctor.

<sup>19</sup> There is no dispute that if a teacher such as Cantwell is absent, there are no employees available to serve as a substitute teacher. Inmates earn credit, i.e., a day off their sentence for every day in the classroom, whether they receive instruction from a teacher in the classroom or stay out in the yard due to a teacher's absence.

percentage of 57%. Your sick leave balance at the time of the review was 133 hours. This review supports that extraordinary usage of sick leave exists.

Cantwell acknowledged receipt of the notice but asked that she be removed from the Sick Leave Policy based on her significant improvement, i.e., a decrease in sick leave used.<sup>20</sup> Based on the receipt of the second notice, Cantwell filed one of the grievances at issue herein.<sup>21</sup>

### The Thomas Grievance

Emily L. Thomas has been employed by CMC for more than ten years and is currently a teacher of English as a Second Language (ESL). Like Cantwell, she testified that prior to 1997, she had always been told that it would be prudent to keep 80 hours of sick leave on the books. On May 20, 1999, Thomas filed a grievance after she was placed on the "Sick Leave Abuse Policy" for a second year although medical verifications had been furnished for all of her absences, i.e., she was never "docked" for failure to provide a sufficient medical excuse. According to Thomas, it was not until early spring 1999 that she was told that she was being placed on the Sick Leave Abuse Policy and her direct deposit privileges were canceled. In her Level I Grievance Response, Cynthia Semel, Supervisor of Academic Instruction, denied the

---

<sup>20</sup> Cantwell testified that in order to improve her sick leave usage to the extent noted in the second notice, she had reported to work sick. She further testified that she when she spoke with Supervisor of Correctional Education Programs Ray Sadowski in December of 1998, she asked him "... if she was close to being put on the list," to which he responded, "you can only be sick one more hour." Sadowski told Cantwell that "... the policy was unofficial and that you can't quote me on it." However, in January of 1999, Sadowski interrupted a class to advise that she (Cantwell) would be placed on Sick Leave Policy for another year. He (Sadowski) had made a mistake as she had three absences in conjunction with RDOs, vacation, or holidays, i.e., an unwritten criterion. Cantwell testified that the reason she grieved the action was that she wanted the Sick Leave Policy criteria to be in writing.

<sup>21</sup> Beverly Young, Adult Basic Education Teacher, testified that after being placed on the Sick Leave Policy for calendar year 1996-97, she became so terrified of using sick leave that she has accumulated 300 hours of sick leave, i.e., she is afraid that "extraordinary use of sick leave" will be reflected on her performance appraisals.

grievance on the following grounds:

A review of your sick leave use was conducted on March 1, 1999. It was found that you were absent from your job assignment on sick leave a total of six 8-hour days and 9 partial days. There were three occasions that sick leave absences were in conjunction with your regularly scheduled days off. During the 12-month review period you earned 96 hours of sick leave credits and used 74 hours, a usage percentage of 77%. It is also noted that you have no personal or family health conditions on file as approved under the Family Medical Leave Act. This review supports your continued placement on the Education Department's Sick Leave Abuse Policy through October 31, 1999.

However, at Step II of the process, this grievance was partially denied and partially granted, i.e., Associate Warden Blanks took her off sick leave restrictions; however, documentation of being placed on the Sick Leave Policy was not removed from her personnel file. Thomas further testified that she continued with the grievance because she objected to "the unwritten policy."<sup>22</sup>

#### The Troyer Grievance

On March 18, 1998, David Troyer, a teacher hired under the LEAP program (an affirmative action program for handicapped individuals) received a Notice of Placement on Sick Leave Policy based on his usage of sick leave during the period from February 1997 to February 1998 which was described as follows:

During the 12-month review, you have been absent on sick leave from your job assignment a total of 8 days. I have noted that there is one occasion that sick leave absence was in conjunction with your regularly scheduled day off (RDO's) and

---

<sup>22</sup> In the same vein, Louisa Bonilla, an ESL teacher, testified that she was first placed on the Sick Leave Policy in 1997. During a conversation with Cynthia Semel about how to meet the criteria to get off the program, Semel told her words to the effect that since the Unit 3 contract did not contain specific guidelines, she could not be specific, i.e., "we have to wait until the contract is more specific before we can let people know what the policy is." Bonilla regarded the whole situation as a "cat and mouse game" because she could not ascertain precisely what she needed to do to be taken off the Sick Leave Policy.

1 holiday, and 3 occasions that sick leave was used in conjunction with vacation time.  
2 Utilization of sick leave in conjunction with RDOs, vacation and holidays is considered  
3 a classic indicator of sick leave abuse. During this 12-month review, you earned 96  
4 hours of sick leave credit and you used 72.5 hours. Your sick leave balance at the time  
of the review was 24 hours. This review supports that extraordinary usage of sick  
leave exists.

5 Troyer's performance evaluation dated March 18, 1998 reflects that he was placed on the Sick  
6 Leave Abuse Policy for a period of one year effective March 1, 1998 through February 28,  
7 1999 at which time his attendance record would be reviewed. Troyer testified that he was  
8 never taken off the Sick Leave Policy until he retired  
9

10 Troyer testified that he used sick leave for his degenerative back condition,<sup>23</sup> as well as  
11 for his wife's health problems. He always brought in medical verification and he was never  
12 docked for his absences. Troyer was out almost the entire month of December of 1998 due to  
13 a bout of pneumonia and was informed that due to his being on the Sick Leave Policy, he was  
14 ineligible to receive donations of sick leave from other employees, i.e., to participate in the  
15 Catastrophic Time Bank Program.  
16

17 On May 20, 1999, Troyer filed a grievance. Troyer claims that the State violated  
18 Section 8.2 of the Unit 3 contract by placing him on the "abuse policy" for the third year  
19 although the verifications he brought for the first two years confirmed correct sick leave  
20 usage.<sup>24</sup> In a Level 1 Grievance Response dated June 3, 1999, Employee Relations Officer  
21 Herb Conner denied the grievance on the stated grounds that the Sick Leave Policy is in full  
22

---

23  
24 <sup>23</sup> Troyer admits that since 1978, he had been using 100% of his sick leave every year due to his  
25 back. He testified that his placement on the Sick Leave Abuse Policy contributed to his decision to retire  
from state service.

26 <sup>24</sup> Troyer was particularly offended by the use of the term "abuse" because he believes that he had  
27 reported to work when others would have been home curled up in bed.  
28

1 compliance with the Unit 3 contract.<sup>25</sup>

2 **Testimony of Supervisors**

3 Mary Cornelius, Supervisor of Vocational Instruction, was asked whether or not there  
4 exists a sick leave policy at CMC. She responded: "There certainly is a set of guidelines which  
5 were developed three years ago by the supervisors." She further admitted that these guidelines  
6 are modeled after the Unit 6 guidelines and that Unit 3 employees are not provided with the  
7 guidelines either orally or in writing. However, Cornelius does not believe that CMC is acting  
8 outside the parameters of the Unit 3 contract. According to Cornelius, there are exceptions to  
9 the guidelines, i.e., a catastrophic event such stroke, heart attack, a serious accident, or an  
10 illness which qualifies under the Family Medical Leave Act.<sup>26</sup> Cornelius admitted that even  
11 employees who have been absent for medically verifiable reasons may still be placed on the  
12 Sick Leave Abuse Policy. Partial days off, although not relevant for payroll purposes, may still  
13 be considered in deciding whether an employee's use of sick leave is extraordinary. According  
14 to Cornelius, attendance had improved among the teachers although some teachers have been  
15 coming to work with colds and viruses.<sup>27</sup>

---

16  
17  
18  
19  
20 <sup>25</sup> In this regard, the Level 1 response states: "The term "abuse" is taken directly from the Unit 3  
Contract language, as is the case with the phrase "above average use."

21 <sup>26</sup> This testimony was corroborated by Cynthia Semel who stated that there was no automatic  
22 placement on the Sick Leave Abuse Policy but rather individual circumstances were taken into account  
23 such as a car accident, cancer, a heart attack or stroke.

24 <sup>27</sup> Debora Roberts, Office Supervisor, testified that although she was aware that the sick leave  
25 guidelines existed in writing, she was told by Sadowski not to give employees the written policy so that it  
26 would not set a precedent for other facilities. According to Roberts, in the beginning 80-85% of all  
27 teachers were placed on the policy. Today, very few (5 to 6) remain on the policy, i.e., there has been  
28 significant improvement in attendance. Roberts also testified that even supervisors, e.g., Mary Cornelius,  
have been placed on the policy. Roberts acknowledged that she has seen teachers coming to work ill  
since the advent of the Sick Leave Abuse Policy.

**The Unit 6 Contract**

That portion of the Unit 6 contract dealing with leaves (Article X) was admitted into evidence. Section 10.02.D (Extraordinary Use of Sick Leave) provides in pertinent part:

1. An employee has established a pattern of "Extraordinary Use of Sick Leave" if:
  - a. An employee has more than five (5) occasions of sick leave usage which total nine (9) or more days of sick leave use within the prior twelve-consecutive-month period.
  - b. An employee has three (3) or more separate occasions of sick leave in the prior twelve-consecutive-month period in conjunction with his/her established RDOs.
  - c. An employee establishes any bona fide pattern of sick leave use during the prior twelve-consecutive-month period.
  - d. An employee attempts to use sick leave on a date which the employee previously requested a form of leave covered by this MOU but was denied.
2. The following sick leave absences shall not be counted as any part of an "Extraordinary Use of Sick Leave" determination:
  - a. Any prescheduled and approved medical/dental/family care appointments, including long-term medical care.
  - b. Any situation where the employee reports to work but the employer determines or concurs the employee is too sick to work.
  - c. The three (3) days of sick leave used before a workers' compensation claim becomes active.
  - d. Any absences that have an extended sick leave situation resulting from injury, major illness or pregnancy.
3. If a pattern of "Extraordinary Use of Sick Leave" has been established, the affected employee must be noticed in writing of the determination and the requirements of being placed on "Extraordinary Use of Sick Leave" status. Said notice should provide a complete listing of all the sick leave absences included in the "Extraordinary Use of

1 Sick Leave" determination. This notice is not a letter of instruction or work  
2 improvement discussion.

3 4. As long as an employee is on "Extraordinary Use of Sick Leave," he/she must  
4 provide a medical verification for every subsequent sick leave absence and the  
5 employee shall be required to personally present him/herself before the licensed  
6 physician, nurse practitioner, or other health care specialist/professional rather than  
simply telephonically informing the physician of his/her condition and receiving a "call-  
in medical verification."

7 5. When an employee has been placed on the "Extraordinary Use of Sick Leave" list  
8 requiring automatic medical verification, the notice to the employee of placement on  
9 said list shall include an expiration date of no longer than six (6) months. If, during this  
10 six (6) month period, the employee has consistently adhered to management  
requirements of producing necessary verification of sick leave, no new notice of  
"Extraordinary Use of Sick Leave" may be issued based on this period of time.

11 At the hearing, Supervisor of Vocational Instruction Cornelius admitted that CMC has  
12 adopted an informal set of guidelines consistent with a portion of the Unit 6 contract.

### 13 **Bargaining History**

14 Dennis Fuji has been either a member of the state's Unit 3 bargaining team, if not the  
15 Chief Negotiator, during the period from 1984 to 1999. During this period of time, the  
16 language of section 8.2 has remained unchanged, i.e., being rolled over into the next  
17 agreement. According to Fuji, this language has been carried forward with the idea that  
18 management should have flexibility in determining, on a case by case basis, whether or not a  
19 medical verification will be required, i.e., a fundamental principle agreed to by both parties.  
20 Fuji recalled that during the 1984 negotiations, the language "above average use of sick leave"  
21 was discussed and it was mutually agreed that management would make this judgment on a  
22 case by case basis.  
23  
24

25 ///

**Testimony of Ray Sadowski**

Supervisor of Correctional Instruction Sadowski admitted that after the CMC Extraordinary Sick Leave Policy and Extraordinary Sick Time Usage Guidelines were rescinded, he used the same criteria but, per Warden Duncan's order, he could no longer provide the Education staff with the written guidelines. Sadowski noted that CSEA steward Don Marriott was going to disseminate a memorandum that would inform the Education Staff of the now unwritten criteria; however, Marriott's memorandum was inaccurate.<sup>28</sup> Sadowski contacted Labor Relations Department of the Department of Corrections and was assured that the unwritten guidelines were consistent with the broad language of the Unit 3 contract.<sup>29</sup> Sadowski emphasized that he directed supervisors to take into consideration individual circumstances, e.g., cancer, car accidents, surgeries, and strokes.<sup>30</sup> In his discussions with Warden Duncan, Sadowski provided assurances that he would evaluate each case individually; however, he also reminded Warden Duncan that, due to budgetary constraints, he was unable to hire substitute teachers.

Sadowski testified that, as of the date of the hearing, there were only three people on the Sick Leave Abuse Policy and attendance had improved dramatically. Additionally, so-called "S time" (inmate credit off sentence for attending school even when no teacher is present) has

---

<sup>28</sup> Sadowski testified that he told Marriott that bargaining unit members who had been placed on the policy in January of 1997 had a copy of the written guidelines. Sadowski admitted that prior to the issuance of his January 22, 1997 memorandum, there had been no criteria for placement on the Sick Leave Abuse Policy.

<sup>29</sup> Sadowski testified that Rubin Ortega, after reviewing the guidelines, opined that the guidelines did not violate the contract. Ortega was not called as a witness by either party.

<sup>30</sup> In the same vein, if a person were home with a sick child or spouse, Sadowski would not count time up to 96 hours per year as use of family sick leave.



1 also been reduced. Other than the loss of direct deposit privileges,<sup>31</sup> there has been no loss of  
2 benefits. None of the Grievants herein have been the subject of an adverse action as a result of  
3 being placed on the Sick Leave Abuse Policy. However, Sadowski admitted that an employee  
4 placed on the policy for a second consecutive year would be subject to a letter of instruction  
5 and that during a third consecutive year of being placed on the policy, an employee would be  
6 subject to an adverse action.  
7

#### 8 **Testimony of Frances Law**

9 Frances Law, Labor Relations Officer, Department of Personnel Administration, has  
10 acted as the chief spokesperson in Master Table negotiations (Units i, 3, 4, And 11). During  
11 1999, the parties to the Master Table negotiations agreed to a change in the sick leave portion  
12 of the Unit 3 contract, i.e., 8.2 (e) (3) was deleted.<sup>32</sup> It was also agreed that the state would no  
13 longer request a doctor's excuse for two consecutive days off if there was no reason to  
14 believe that the absence was unauthorized. However, the parties agreed that if there is a  
15 "demonstrable pattern of abuse," then the supervisor could ask for a doctor's excuse. Even if  
16 the absence is for one hour, under Section 8(e)(2), if the supervisor believes that the absence is  
17 unauthorized, he can ask for medical documentation. According to Law, the State still takes  
18 the position that even an excused absence may properly be counted in ascertaining whether  
19 there is a demonstrable pattern of sick leave abuse.  
20  
21

---

22  
23 <sup>31</sup> As explained by Employee Relations Officer Connor, direct deposit is not referenced in the  
24 Unit 3 contract. Connor explained that CMC management had a concern that an employee placed on the  
25 Sick Leave Abuse Policy might receive a full paycheck through automatic deposit even when a decision  
had been made to dock the employee's wages.

26 <sup>32</sup> This provision establishes "above average use of sick leave" as a criterion for requiring a  
27 physician's verification.  
28

## POSITION OF CSEA

The Sick Leave Abuse Policy violates Article 8.2 (Sick Leave) of the MOU. The record establishes that the policy which was utilized to place the Grievants on the Sick Leave Abuse Policy is contained in the memorandum which was supposedly rescinded.

The language of Article 8.2, section (e) is clear and unambiguous in mandating that employees are **not** required to provide a physician's verification when using two consecutive days of sick leave except when (1) The employee has a demonstrable patterns of sick leave abuse; or (2) the supervisor believes the absence was for an unauthorized reason; or (3) the employee has an above average use of sick leave. The unwritten extra contractual policy relied on by CMC management does not distinguish between "use" and "abuse" nor does it require that the supervisor believe that the absence is for an unauthorized reason. It merely defines above average use as over nine days of sick leave within a twelve-month period.

The State is attempting to implement language it failed to obtain through the collective bargaining process. Dennis Fuji testified that the parties could not reach agreement as to specific criteria so that a good compromise was to give the managers flexibility. Here, Sadowski's subordinate managers have not been given individual discretion to deviate from Sadowski's specific criteria. Moreover, it is improper for the State to impose specific contract language from one bargaining unit to another. The Unit 6 contract contains an entire section related to "Extraordinary Use of Sick Leave" but the Unit 3 contract contains no such provision.

Employees placed on the policy suffer the following detriments: employees must obtain doctor's excuses while their absences remain an indicator of sick leave abuse; direct deposit

1 privileges are revoked in violation of the State's own policy; placement on the policy may  
2 result in progressive discipline; unit employees report to work ill; and unit employees may lose  
3 the opportunity to receive assistance from co-workers for catastrophic illness.

4  
5 Since CSEA complained about the policy, the policy, ostensibly rescinded, has become  
6 more onerous. Employees first placed on the policy in January of 1997 did not have their direct  
7 deposit revoked while employees given notice in July 1997 did. The July 1997 notices placed  
8 the employees on the Sick Leave Policy for one year as opposed to six months, i.e., the  
9 duration of the policy in January 1997.

#### 10 POSITION OF THE STATE

11  
12 In interpreting a collective bargaining agreement, the role of the arbitrator is to  
13 ascertain the intent of the parties as expressed in the contract language, to give ordinary  
14 meaning to the words used, and to read the language of the contract as a whole. *City of Ann*  
15 *Arbor*, 102 LA 801 (Roumell, 1994).

16  
17 The State has the right to manage its work force for the orderly and efficient operation  
18 of its facilities unless limited by specific provisions of the agreement. It is up to the State, and  
19 the management of the individual departments, to determine the methods and means by which  
20 the operations are to be conducted, and also to make reasonable rules and regulations which  
21 are not inconsistent with the contract.

22  
23 Just as in *Ann Arbor*, none of the provisions of Section 8.2 (e) absolutely limit the right  
24 to request a physician's statement. Instead, the language indirectly provides for just those  
25 occasions upon which a physician's statement may be required for future sick leave use.  
26 Management has a right to make the policies, rules and regulations to carry out the contract

1 terms.

2 In order to apply the sick leave restriction provisions of the agreement to all Unit 3  
3 employees, management has to set criteria to apply to the employee's history of sick leave  
4 use. These criteria were in writing until CSEA grieved the written policy. CSEA cannot have  
5 it both ways, i.e., complaining that the policy was not provided in writing to the staff while  
6 grieving the written policy as allegedly inconsistent with contract language.

7  
8 Just because more specific language could not be agreed to at the bargaining table does  
9 not mean that the State's right to implement the contract terms by means of a policy has been  
10 abrogated. Consistent with the negotiations that produced the disputed language, the State  
11 looks at each individual's history of sick leave use and exceptions are made for car accidents  
12 and heart attacks.

13  
14 Physician's verifications do not always make sick leave proper. Employers whether  
15 they are in the private sector or the public sector, hire employees because they need them to  
16 work and need them at work every day that they operate, and need them on time on the job.  
17 *Consolidated School District No. 180*, 93 LA 1219, Weis, 1989. CMC is permitted to require  
18 a physician's verification as a condition precedent to approving sick leave. California Code of  
19 Regulations, Article 10, "Sick Leave," Section 599.749.

20  
21 The sick leave restriction policy, as applied to these three Grievants, does not violate  
22 the terms of the Unit 3 MOU. The language is sufficiently broad to allow for individual  
23 consideration within the policy guidelines developed by the Department. No employee rights  
24 or benefits as granted by the contract have been impinged or violated.  
25  
26  
27  
28

## OPINION

In resolving any issue of contract interpretation, the role of the arbitrator is always to ascertain and give effect to the mutual intentions of the parties at the time they entered into the contract. In the instant case, the arbitrator must determine whether the Sick Leave Usage Guidelines and the Sick Leave Abuse Policy are nothing more than a reasonable implementation of the broad general language of the Agreement (as argued by the State) or, alternatively, whether the guidelines and the policy have the effect of unilaterally changing conditions of sick leave usage for members of the Unit 3 bargaining unit (as argued by CSEA).

**The Extraordinary Sick Time Usage Guidelines have not been applied in a manner consistent with the Agreement.**

By all accounts, the "Extraordinary Sick Time Usage Guidelines" (as originally promulgated in writing) have continued to be applied by CMC management subsequent to the date of their purported rescission.<sup>33</sup> These guidelines continue to be used, not only to evaluate whether medical verification is required, but also to construct the sick leave profile associated with placement on the Sick Leave Abuse Policy. While Article 4.1 gives the State the right to promulgate reasonable rules pertaining to physician verification which are consistent with the Agreement, the manner in which the guidelines have been used, i.e., to construct sick leave profiles to justify placement on the Sick Leave Abuse policy, is contrary to the mutual intent of the parties as reflected in the language of the Agreement.

The Agreement herein contains both general and specific language. On the one hand,

---

<sup>33</sup> It is unclear whether the guidelines have been continued exactly as written, e.g., Job Steward Wimer testified that prescheduled medical and dental appointments, although originally excluded, have been counted in evaluating whether to place an employee on the Sick Leave Abuse Policy.

1 the language of Article 8.2 (d) broadly authorizes a department head or designee to require an  
2 employee to submit substantiating evidence as a condition precedent to receiving approved  
3 sick leave. However, the more specific language of Article 8.2 (e) provides that the  
4 requirement of a physician's verification for two consecutive days of sick leave may not be  
5 imposed except when:  
6

- 7 (1) the employee has a demonstrable pattern of sick leave abuse; or
- 8 (2) the supervisor believes the absence was for an unauthorized reason; or
- 9 (3) the employee has an above average use of sick leave.

10 Consistent with the language of Article 8.2 (d) and (e), the written guidelines #1 through #5  
11 (as set forth in Sadowski's January 22, 1997 memorandum to all Education Staff) are  
12 reasonable interpretations of the circumstances under which the State may require medical  
13 verification of illness or injury on a case by case basis. However, the Agreement, unlike the  
14 Unit 6 contract, does not provide for placement on an "Extraordinary Use of Sick Leave" list  
15 requiring automatic medical verification.

16 Here, the language of the Agreement mandates that the requirement of medical  
17 verification be decided on a case by case basis with due deference to individual facts and  
18 circumstances.<sup>34</sup> While it is true that the State made some allowances for car accidents and  
19 catastrophic illness, no specific evidence was offered to show that the sick leave guidelines  
20 were otherwise applied on a case by case basis. Rather, the weight of the evidence establishes  
21 that the guidelines were uniformly applied with few exceptions. The boilerplate profile of sick  
22 leave usage found in all of the Notices of Placement on Sick Leave Policy does not distinguish  
23  
24

---

25 <sup>34</sup> As further explained in the next section, this interpretation flows from the fact that medical  
26 verification, by the terms of the Agreement, only becomes an issue at the time of approval or denial of sick  
27 leave.  
28

1 between and among the individualized circumstances pertaining to each of the Grievants.

2 Thus, although guidelines #1 through #5 may constitute a reasonable interpretation of  
3 circumstances when medical verification may be required, the mechanical application of these  
4 guidelines to create a sick leave profile and placement on the Sick Leave Abuse Policy violates  
5 the letter and spirit of the Agreement. Moreover, the fact that the written guidelines were  
6 rescinded, and yet continue to be applied, undermines CSEA's ability to monitor the State's  
7 compliance with the terms of the Agreement.  
8

9 In sum, the arbitrator has concluded that the State had the right to issue guidelines #1  
10 through #5 to its supervisors to assist them in determining when medical verification may be  
11 required. The issuance of these guidelines for this purpose is consistent with Article 8.2 of the  
12 Agreement. However, the State did not have the right to apply guidelines #1 through #5  
13 inflexibly, to use these rules to place Grievants on the Sick Leave Abuse Policy, or to fail to  
14 disclose these guidelines to CSEA and its members.  
15

16 **The requirement of automatic verification of future absences violates the Agreement.**

17 The arbitrator has further concluded that the State may not require blanket verification  
18 of all *future* absences, i.e., an advance medical verification requirement for every absence of  
19 individuals who have been placed on the Sick Leave Abuse Policy, without violating the  
20 language of Article 8.2. In studying the language of Article 8.2, the arbitrator is struck by the  
21 fact that the requirement of medical verification is tied to the approval or denial of the  
22 negotiated sick leave benefit. Specifically, Article 8.2 (d) provides:  
23

24 The department head or designee shall approve sick leave only after having ascertained  
25 that the absence is for an authorized reason **and** may require the employee to submit  
26 substantiating evidence including, but not limited to, a physician's or licensed  
27  
28

practitioner's verification (emphasis supplied).

The above-quoted language demonstrates that the parties contemplated that the requirement of a medical verification would only arise *at or near the time* of the absence in question, i.e., when deciding whether or not to approve sick leave. This conclusion is consistent with ordinary principles of construction, i.e., that words derive their meaning from the other words with which they are associated. In short, the close proximity of the words "shall approve sick leave" with the words "may require... verification" demonstrates that medical verification was linked to sick leave approval by the Agreement's drafters. Absent the type of language found in section 10.02 D (Extraordinary Use of Sick Leave) of the Unit 6 contract, this wording signifies that not only sick leave approval or denial, but also the issue of whether to require medical verification, must be decided on a case by case basis *at or near the time of the absence*.

Moreover, nothing in the language of Article 8.2, or any other language cited by either party, even suggests that the parties intended that medical verification would be automatically required to justify *future* absences on a long-term or open-ended<sup>35</sup> basis. Rather, the Agreement, when read as a whole, contemplates that the unique circumstances of each absence will be evaluated by a supervisor and that no criterion will be mechanically applied in accord with a predetermined formula.

The arbitrator's interpretation finds support in the testimony of the State's negotiator Dennis Fuji who distinctly recalled that the parties, unable to agree to specific criteria for

---

<sup>35</sup> Evidence establishes that individuals placed on the policy were subject to rescission or renewal after expiration of the twelve-month period.



1 requiring a medical verification, intended that management would examine the need for  
2 medical verification on a case by case basis. The term "case by case" signifies that  
3 management will not only consider individual circumstances related to a given employee but  
4 that it will also consider the unique circumstances of each incident giving rise to an absence.  
5 An automatic requirement of medical verification for future absences, while certainly an  
6 effective way to reduce sick leave usage, does not conform to contractual requirements.  
7 Finally, the obvious similarities between the extracontractual "Sick Leave Abuse Policy" and  
8 the "Extraordinary Use of Sick Leave" provisions of the Unit 6 contract provides persuasive  
9 evidence that the State seeks to apply various portions of the Unit 6 contract to the Unit 3  
10 bargaining unit.  
11

12  
13 **The evidence does not establish that the State violated Article 5.5 (Reprisals)**

14 CSEA argues that the escalating impact of the Notices of Placement on Sick Leave  
15 Policy were in retaliation for CSEA's successful efforts to have the guidelines rescinded by  
16 Warden Duncan. However, this argument ignores the fact that the Sick Leave Abuse Policy  
17 was obviously driven by CMC's concern about what it regarded as excessive sick leave usage,  
18 its potential impact on appropriations, and the accumulation of "S time" by inmates.  
19 Sadowski's testimony, as a whole, demonstrates that he was motivated, not by anti-union  
20 animus, but rather by a commitment to reducing sick leave usage as requested by the  
21 Department's Director. Moreover, the removal of direct deposit privileges had a legitimate  
22 business motive, i.e., to avoid overpayments to workers who may be denied sick leave.  
23 Finally, another plausible reason to explain the changes in the guidelines and policy from  
24 January to July 1997 is that the State may have sought to distance the CMC policy and  
25  
26  
27  
28

1 guidelines from the language of the Unit 6 contract. In any event, there is insufficient evidence  
2 to establish that the State has engaged in retaliatory conduct, or otherwise violated Article 5.5  
3 of the Agreement.

## 4 CONCLUSION

5  
6 The State has the expansive right to request medical verification for use of two  
7 consecutive days of sick leave as provided in Article 8.2 (e). Moreover, under Article 4.1, the  
8 State may promulgate reasonable rules pertaining to medical verification which are consistent  
9 with the language of the Agreement. However, this does not signify that an extracontractual  
10 requirement of automatic medical verification may be established for *future* absences on a  
11 long-term or open-ended basis. Such a requirement is contrary to the mutual understanding of  
12 the parties that absences would be reviewed on a case by case basis in connection with  
13 approval or denial of sick leave.

14  
15 To be sure, the State has a right to monitor sick leave usage for the purpose of  
16 reducing its liability for payment of sick leave benefits and other costs associated with  
17 employee absences and to insure the accomplishment of its mission. Moreover, there is no  
18 question that even where absences are excused by medical verification, the State has a  
19 legitimate interest in setting standards for attendance and in enforcing those standards. Indeed,  
20 nothing prevents the State, under the terms of the Agreement, from taking the necessary steps  
21 to improve the attendance of its workers as long as it evaluates each absence on a case by case  
22 basis with due regard for individual facts and circumstances. However, where the State has  
23 agreed to consider whether to require medical verifications on a case by case basis, it cannot  
24 require blanket verification of all future absences without regard to the specifics of each  
25  
26

1 occurrence of absence. Under the circumstances presented here, requiring automatic  
2 verification of future absences violates Article 8.2 of the Agreement.

3 Based on the foregoing findings of fact and conclusions, the following award is made:

4 **AWARD**

5 The grievance is granted in part and denied in part.

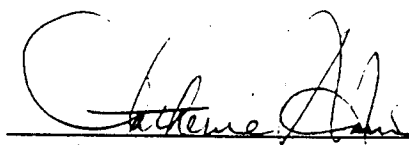
6 The State violated Article 8.2 by issuing Notices of Placement on Sick Leave Policy to  
7 the Grievants and by requiring the Grievants to produce automatic medical verification of all  
8 absences.

9 The State did not violate Article 5.5.

10 The State is ordered to remove the Notices of Placement on Sick Leave Policy from  
11 the Grievants' personnel files, as well as any references to the Notices of Placement on Sick  
12 Leave Policy from the Grievants' performance appraisals.

13 The arbitrator retains jurisdiction over any dispute arising in connection with the  
14 implementation of the award.

15 Dated: October 8, 2001

16  
17  
18   
19 CATHERINE HARRIS, Arbitrator